Aggravating and Mitigating Role Adjustments Primer
§§ 3B1.1 & 3B1.2

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I. INTRODUCTION

This primer discusses issues related to adjustments pursuant to United States Sentencing Guidelines (USSG) §§ 3B1.1 and 3B1.2 based on the defendant's aggravating or mitigating role in the offense. This primer addresses procedural questions related to the adjustments, the definitions of terms used in the adjustments, and issues concerning adjustments' application. It is not, however, intended as a comprehensive compilation of all case law addressing these issues.

Together, §§ 3B1.1 and 3B1.2 serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct. To this end, §3B1.1 increases the defendant's base offense level if he or she served as an organizer, leader, manager or supervisor in certain criminal activity, whereas §3B1.2 decreases the defendant's base offense level if he or she served as only a minor or minimal participant in the criminal activity.

II. AGGRAVATING ROLE: §3B1.1

Section 3B1.1 provides for 2-, 3-, and 4-level increases to the offense level if the defendant held an aggravating role in the offense:

> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

USSG §3B1.1. Applying the adjustment turns, first, on the size and scope of the criminal activity and, second, on the defendant's particular role in that activity. *See* USSG §3B1.1, comment. (backg'd).

A. Size and Scope of the Criminal Activity

To apply a 3- or 4-level adjustment pursuant to §3B1.1(a) or (b), the criminal activity must have involved at least five participants or have been "otherwise extensive." In the absence of such a criminal activity, the defendant may only be subject to a 2-level increase pursuant to §3B1.1(c). Accordingly, in applying §3B1.1, the sentencing court must first determine the size and scope of the criminal activity.

The government bears the burden of proving by a preponderance of the evidence that the defendant should receive an aggravating role adjustment. *See, e.g., United States v. Al-Rikabi*, 606 F.3d 11, 14 (1st Cir. 2010); *United States v. Cruz Camacho*, 137 F.3d 1220, 1224 (10th Cir. 1998) ("The burden is on the government to prove, by a preponderance of the evidence, the facts necessary to establish a defendant's leadership role."). Upon finding that the government has met its burden of proving the requisite facts, the district court must apply the appropriate enhancement and has no discretion to decide whether to apply §3B1.1. *See United States v. Jimenez*, 68 F.3d 49 (2d Cir. 1995). "[T]he determination of a defendant's role in an offense is necessarily fact-specific. Appellate courts review such determinations only for clear error. Thus, absent a mistake of law, battles over a defendant's status and over the scope of the criminal enterprise will almost always be won or lost in the district court." *United States v. Graciani*, 61 F.3d 70, 75 (1st Cir. 1995) (citations omitted).

1. "Five or more participants"

Application Note 1 to § 3B1.1 defines a "participant" as "a person who is criminally responsible for the commission of the offense." USSG §3B1.1, comment. (n.1). A person who is not criminally responsible for committing the offense is not a participant; however, §3B1.1 does not require that a criminally responsible person actually be convicted to qualify as a "participant." *See id.* The defendant, as a criminally responsible person, *is* a participant for purposes of counting the number of participants under §3B1.1. *See United States v. Paccione*, 202 F.3d 622, 625 (2d Cir. 2000) (holding, consistent with "the apparent consensus among our sister circuits," that "a defendant may be included when determining whether there were five or more participants in the criminal activity in question").

The guidelines specifically provide that undercover law enforcement officers are not participants because they are not criminally responsible for committing the offense. USSG §3B1.1, comment. (n.1). Unlike undercover officers, however, an informant may be considered a "participant" for any period of time during which he or she was a member of the conspiracy, before becoming a governmental informant. *See United States v. Capps*, 952 F.2d 1026 (8th Cir. 1991); *see also United States v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990) (concluding that a person was not a "participant" because he "was an informant and undercover operative who had not been involved in [the] distribution network and was acting at the direction of the government").

Courts "uniformly count" as participants those who "were (i) aware of the criminal objective, and (ii) knowingly offered their assistance." *United States v. Anthony*, 280 F.3d 694, 698 (6th Cir. 2002); *accord United States v. Boutte*, 13 F.3d 855, 860 (5th Cir. 1994) (concluding that a person "need only have participated knowingly in some part of the criminal enterprise" to be a participant). Consistent with this principle, persons who are not co-conspirators can be "participants" if they aid the defendant with knowledge of the criminal activity. Accordingly, the definition of a "participant" is broader than conspiratorial liability. For example, in *United States v. Aptt*, 354 F.3d 1269 (10th Cir. 2004), the court held that the defendant's high-level employee,

who continued to solicit investments despite having notice that the company was operating a Ponzi scheme and made knowingly false representations to potential investors, was a "participant" in the criminal activity. Similarly, in *United States v. Alfonzo-Reyes*, 592 F.3d 280 (1st Cir. 2010), the court held that the defendant's wife was a "participant" in his fraud scheme where she knowingly falsified government loan applications at her husband's direction.

Conversely, an unwitting person is not a participant, even if the person assisted the criminal enterprise, because he or she ordinarily bears no criminal responsibility. *See United States v. McCoy*, 242 F.3d 399, 410 (D.C. Cir. 2001); *see also United States v. Harvey*, 532 F.3d 326, 338 (4th Cir. 2008) ("'Participants' are persons involved in the activity who are criminally responsible, not innocent bystanders used in the furtherance of the illegal activity."). For example, in *United States v. King*, 257 F.3d 1013 (9th Cir. 2001), the court held that the defendant's employees were not "participants" in his mail fraud schemes because they were merely "innocent clerical workers." In *United States v. Stevenson*, 6 F.3d 1262 (7th Cir. 1993), the court held that an unwitting minor whom the defendant used a messenger in his criminal activity was not a "participant." And in *United States v. Anthony*, 280 F.3d 694 (6th Cir. 2002), the court held that the defendant's attorney was not the necessary fifth "participant" in a scheme to make materially false statements to federal investigators, despite writing the key letter that conveyed his client's false statements to authorities, because he apparently did not know the statements were false. Likewise, a person's mere knowledge that criminal activity is afoot does not ordinarily make that person a "participant," absent some act in furtherance of the activity. *See United States v. Mann*, 161 F.3d 840, 867 (5th Cir. 1998) ("A finding that other persons 'knew what was going on' is not a finding that these persons were criminally responsible for commission of an offense.").

In the drug conspiracy context, courts have held that end users of controlled substances are not "participants" in distribution conspiracies. "Where the customers are solely end users of controlled substances, they do not qualify as participants . . . absent an intent to distribute or dispense the substance. In order to qualify as a participant, a customer must do more than simply purchase small quantities of a drug for his personal use." *United States v. Egge,* 223 F.2d 1128, 1133-34 (9th Cir. 2000); *see also United States v. Barrie*, 267 F.3d 220, 224 (3d Cir. 2001) ("Customers of drug dealers ordinarily cannot be counted as participants in a drug distribution conspiracy.").[1] Individuals who are more than mere end-user purchasers, such as a buyer who purchases drugs for further distribution or those who assist the transportation of drugs, are "participants" under § 3B1.1. *See United States v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990) (concluding that individuals to whom the defendant distributed crack cocaine, "who were themselves distributors" were "not end users . . . but were lower level distributors used by [the defendant] to market illegal drugs" and thus participants); *see also United States v. Garcia-*

[1] Courts have also held that persons who receive stolen property, but without knowledge that it was stolen or without any participation in the theft, are not "participants" supporting application of the aggravating role adjustment. *See* United States v. Melendez, 41 F.3d 797, 800 (2d Cir. 1994); United States v. Colletti, 984 F.2d 1339, 1346 (3d Cir. 1992).

Hernandez, 530 F.3d 657, 665 (8th Cir. 2008) (concluding that a buyer was a participant where the defendant sometimes "fronted" him drugs, which he "was required to repay . . . after selling [the drugs] to others"); *United States v. Alvarez*, 927 F.2d 300, 303 (6th Cir. 1991) (affirming the district court's finding that those involved in transporting cocaine for the defendant were "participants").

When determining whether there are "five or more participants" in the criminal activity, the court may consider *all* participants, and not only those who were subordinate to or supervised by the defendant. "The text of the guideline and its commentary does not require that five of the activity's participants be subordinate to the defendant; it merely requires that the activity involve five or more participants." *United States v. Bingham*, 81 F.3d 617, 629 (6th Cir. 1996). Indeed, a defendant does not need to even know of the other participants for purposes of applying §3B1.1. *See United States v. Kamoga*, 177 F.3d 617, 622 (7th Cir. 1999) (holding that "§ 3B1.1 [does not] require[] control over and/or knowledge of all of the other participants in a criminal activity"); *United States v. Dota*, 33 F.3d 1179, 1189 (9th Cir. 1994) ("Section 3B1.1 does not require that [the defendant] knew of or exercised control over all of the participants.").

2. <u>"Otherwise extensive"</u>

Even if the criminal activity did not involve at least five "participants," the defendant may nonetheless be subject to an adjustment pursuant to §3B1.1(a) and (b) if the criminal activity was "otherwise extensive." Whether the criminal activity was "otherwise extensive" encompasses more than merely the number of *participants* because, as Application Note 3 to §3B1.1 provides,"[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." USSG §3B1.1, comment. (n.1).

Multiple circuits follow the test articulated by the Second Circuit in *United States v. Carrozella*, 105 F.3d 796 (2d Cir. 1997), for determining whether the criminal activity was "otherwise extensive." *Carrozzella* held that "otherwise extensive" as used in §3B1.1 requires, at a minimum, "'a showing that an activity is the *functional equivalent* of an activity involving five or more participants.'" *Id.* at 803 (quoting *United States v. Tai*, 41 F.3d 1170, 1174 (7th Cir. 1994)). The sentencing court, in making this determination, must consider "(i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; [and] (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme." *Id.* at 803-04. The second and third factors, the court explained, "separate out" the "service providers who facilitate a particular defendant's criminal activities but are not the functional equivalent of knowing participants" and "[l]awful services that are not peculiarly tailored and necessary to the particular crime but are fungible with others generally available to the public." *Id.* at 804. However, the *Carrozzella* court cautioned that the guidelines' use of the term "otherwise extensive" entails more than mere "head-counting," and that a sentencing court may conclude that the activity was not otherwise extensive even if it involved some combination of at least five knowing and unknown participants. *See id.* at 804. At least three other circuits have adopted the

Carrozzella test. *See United States v. Helbling*, 209 F.3d 226 (3d Cir. 2000); *United States v. Anthony*, 280 F.3d 694 (6th Cir. 2002); *United States v. Wilson*, 240 F.3d 39 (D.C. Cir. 2001).

The First Circuit has adopted a "totality of the circumstances" test for determining whether a criminal activity was otherwise extensive. Under that test, the court may look to all of the circumstances of the criminal activity, "'including . . . the width, breadth, scope, complexity, and duration of the scheme.'" *United States v. Laboy*, 351 F.3d 578, 586 (1st Cir. 2003) (quoting *United States v. Dietz*, 950 F.2d 50, 53 (1st Cir. 1991)). The First Circuit nonetheless views the number of persons involved as relevant, however, explaining that "[i]n most instances, the greater the number of people involved in the criminal activity, the more extensive the activity is likely to be." *Dietz*, 950 F.2d at 53. The Tenth Circuit has adopted the First Circuit's test. *See United States v. Yarnell*, 129 F.3d 1127, 1139 (10th Cir. 1997).

3. "Any criminal activity other than described in (a) or (b)"

To apply the 2-level adjustment established in §3B1.1(c), the court need only conclude that the defendant was involved in a "criminal activity," which need not involve five participants or be otherwise extensive. Subsection (c) is thus broader than the remainder of §3B1.1. Because §3B1.1(c) requires that the defendant act as an organizer, leader, manager, or supervisor of another participant, the court must necessarily find that the "criminal activity" involved at least two participants – the defendant and another person – before applying the 2-level adjustment. *See* USSG §3B1.1, comment. (n.2); *United States v. Williams*, 240 F.3d 1235, 1249 (11th Cir. 2008); *United States v. Lewis*, 476 F.3d 369, 390 (5th Cir. 2007).

The court may not apply §3B1.1(c), however, if it finds that the defendant held an aggravating role in a criminal activity that involved at least five participants or was otherwise extensive. The mandatory language of §3B1.1 requires the sentencing court in such circumstances to apply either subsection (a) or (b), depending on whether the defendant acted as an "organizer or leader" or "manager or supervisor." *See United States v. Ross*, 210 F.3d 916, 925 (8th Cir. 2000) ("In order to impose a two-level enhancement for role in the offense under § 3B1.1(c), the court must first determine that neither § 3B1.1(a) nor § 3B1.1(b) apply."); *United States v. Gonzales-Vazquez*, 219 F.3d 37, 44 (1st Cir. 2000) ("[Section] 3B1.1 sets forth a precise adjustment scheme that cannot be modified by the district court. . . . Therefore, a court may not 'forgo the three-level increase called for by U.S.S.G. § 3B1.1(b) and instead a impose a two-level increase' when it finds mitigating circumstances." (quoting *United States v. Cotto*, 979 F.2d 921, 922 (2d Cir. 1992)); *United States v. Kirkeby*, 11 F.3d 777, 778-79 (8th Cir. 1993) ("A trial court's only options in cases involving a criminal activity with five or more participants are . . . a four-level enhancement under § 3B1.1(a), a three-level enhancement under § 3B1.1(b), or no enhancement at all (if the defendant played no aggravating role in the offense).").

B. Role in the Criminal Activity

Proper application of § 3B1.1 requires the court to determine whether the defendant was an organizer, leader, manager, or supervisor in the criminal activity. "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)." USSG §3B1.1, comment (intro. commentary). Thus, the applicability of §3B1.1 is not limited only to the defendant's participation in the elements of the counts of conviction, but for all relevant conduct attributable to the defendant under §1B1.3. Although the guidelines do not expressly define these terms, the commentary to §3B1.1 provides guidance, and there is an expansive body of case case law interpreting and applying them.

"[T]he line between being an organizer or leader, one the one hand, and a manager or supervisor, on the other, is not always clear . . . ." *United States v. Bahena*, 223 F.3d 797, 804 (8th Cir. 2000) (citing *United States v. Delpit*, 94 F.3d 1134, 1155 (8th Cir. 1996)). Nonetheless, it is clear that the difference between organizers and leaders, and managers and supervisors, turns on the defendant's degree of responsibility in the criminal activity. *See* USSG §3B1.1, comment. (backg'd) ("This section provides a range of adjustments to increase the offense level based upon . . . the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about *relative* responsibility." (emphasis added)); *see also United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989) ("Organizers and leaders of criminal activity play an important role in the planning, developing, directing, and success of the criminal activity. Thus, organizers and leaders generally are deemed more culpable than mere managers or supervisors."). Given this hierarchy of responsibility, conduct within the scope of §3B1.1 overlaps its classifications, so that organizers and leaders also qualify as managers and supervisors. *United States v. Quigley*, 373 F.3d 133, 139 (D.C. Cir. 2004) ("We read subsection (b) to sweep in lower level managerial and supervisory conduct, and subsection (a) to encompass higher level managerial and supervisory conduct . . . . We are confident that all organizers or leaders of a conspiracy qualify as managers or supervisors under § 3B1.1(b).").

To distinguish leaders and organizers from mere managers and supervisors, Application Note 4 provides a non-exhaustive list of factors for the court to consider, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

USSG §3B1.1, comment (n.4). More than one person may qualify as an organizer or leader of a criminal activity, but titles given to members in the criminal activity, such as "kingpin" or "boss," "are not controlling." *Id.*

Courts frequently look to these seven factors to determine whether the defendant was an organizer or leader. If the district court's factual findings establish that some combination of these factors establishes the defendant as an organizer or leader, the court of appeals will likely not disturb the application of § 3B1.1(a). *See United States v. Noble*, 246 F.3d 946, 953-54 (7th Cir. 2001); *United States v. Bahena*, 223 F.3d 797, 804-05 (8th Cir. 2000). However, courts have been careful to note that "[t]he Guidelines do not require that each of the factors be satisfied for § 3B1.1. to apply." *United States v. Bernaugh*, 969 F.2d 858, 863 (10th Cir. 1992); *see also United States v. Tejada-Beltran*, 50 F.3d 105, 111 (1st Cir. 1995) ("There need not be proof of each and every factor before a defendant can be termed an organizer or leader."). Nonetheless, where the district court's factual findings do not reveal that the defendant was an organizer or leader based on factors such as those enumerated in Application Note 4, it may err by applying the 4-level enhancement pursuant to §3B1.1(a). *See*, *e.g.*, *United States v. Martinez*, 584 F.3d 1022 (11th Cir. 2009) (concluding that the district court erred in applying § 3B1.1(a) because the supported factual findings "do not establish, standing alone or in concert, any of the seven factors set forth in Comment Four to Section 3B1.1"); *United States v. Stevens*, 985 F.2d 1175 ("It did not suffice for the court simply to state that it had 'no doubt' that [the defendant] controlled the operation, without giving some explanation as to the evidentiary basis for its view.").

"Organizers" and "leaders" exercise a significant degree of control and decision making authority over the criminal activity. For example, In *United States v. Bolden*, 596 F.3d 976 (8th Cir. 2010), the Eighth Circuit affirmed the district court's conclusion that the defendant was an organizer or leader of a drug conspiracy, where the evidence showed that the defendant recruited members of the conspiracy, "directed those members to distribute drugs," supplied drugs for distribution, "retained a large portion of profit for himself," and "played a role in setting up [drug] transactions." *Id.* at 984; *see also United States v. Garcia*, 512 F.3d 1004, 1006 (8th Cir. 2008) (affirming the application of §3B1.1(a) where the defendant "recruited others to join the conspiracy, he received drug orders from customers, and he directed others to package and deliver drugs").[2] In *United States v. Szur*, 289 F.3d 200 (2d Cir. 2002), the Second Circuit affirmed the district court's finding that the defendant was the organizer or leader of a financial fraud scheme, where he and another person created the scheme, he received half of the proceeds from the sale of fraudulent stock, he recruited others to sell the stock, was an owner of the firm, and was "ultimately responsible for the control of the [firm's] branch offices." *Id.* at 218.

By contrast, to be a manager or supervisor, the defendant need only "have exercised some degree of control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime." *United States v. Fuller*, 897 F.2d 1217, 1220 (1st Cir. 1990); *see also United States v. Hertular*, 562 F.3d 433, 448 (2d Cir. 2009) *("*"A defendant is properly considered as a manager or supervisor . . . if he

[2] In drug trafficking cases, a defendant is not an "organizer" or "leader" solely because he bought or sold narcotics, even in large amounts. *See* United States v. Sayles, 296 F.3d 219, 227 (4th Cir. 2002). However, a court may consider the quantity of drugs where the evidence shows that the defendant was more than just a mere buyer or seller. *See* United States v. Ponce, 51 F.3d 820 (9th Cir. 1995); United States v. Iguaran-Palmar, 926 F.2d 7 (1st Cir. 1991); United States v. Garvey, 905 F.2d 1144 (8th Cir. 1990).

'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or supervise lower-level participants.'"); *United States v. Chau*, 293 F.3d 96, 103 (3d Cir. 2002) ("[A] manager or supervisor is one who exercises some degree of control over others involved in the offense." (internal quotations and alterations omitted)); *United States v. Backas*, 901 F.2d 1528, 1530. (10th Cir. 1990) ("In order to be a supervisor, one needs merely to give some form of direction or supervision to someone subordinate in the criminal activity for which the sentence is given.").

In *United States v. Solorio*, 337 F.3d 580 (6th Cir. 2003), the Sixth Circuit held the district court properly concluded the defendant was a "supervisor" in a "vast drug enterprise" where he recruited and exercised control over just one accomplice by directing that accomplice's drug activities. *Id.* at 601. Similarly, in *United States v. Voegtlin*, 437 F.3d 741 (8th Cir. 2006), the Eighth Circuit affirmed the district court's application of the 2-level adjustment on grounds that the defendant acted as a supervisor or manager by "[i]nstructing others to obtain precursors used to produce methamphetamine." *Id.* at 748. In *United States v. Griffin*, 148 F.3d 850 (7th Cir. 1998), the defendant acted as a "manager" of a chop-shop operation where he placed orders for stolen vehicles, gave instructions to thieves as to what kinds of vehicles to steal, gave instructions for dismantling the stolen vehicles, and managed the disposition of stolen car parts. *Id.* at 856. And in *United States v. Powell*, 124 F.3d 655 (5th Cir. 1997), the defendant was a "supervisor" for purposes of §3B1.1(c) in evading federal fuel taxes where he supervised a single accountant's preparation of fraudulent tax documents. *Id.* at 667.

The guidelines commentary notes that, with respect to smaller criminal activities that involve fewer than five participants or are not otherwise extensive, "the distinction between organization and leadership, and that of management or supervision is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility." Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant. *See* USSG §3B1.1, comment. (backg'd)

III. MITIGATING ROLE, §3B1.2

Section 3B1.2 provides for 2-, 3-, and 4-level decreases to the offense level depending on the defendant's mitigating role in the offense:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

USSG §3B1.2. Application of §3B1.2 turns primarily on the defendant's particular role in the criminal activity, specifically whether he or she was a "minimal" or "minor" participant. *See id.* "The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the case." USSG §3B1.2, comment. (n.3(C)).

The defendant bears the burden of proving by the preponderance of the evidence that he is entitled to a mitigating role adjustment. *See United States v. Carpenter,* 252 F.3d 230, 234 (2d Cir. 2001); *United States v. Brubaker*, 362 F.3d 1068, 1071 (8th Cir. 2004); *United States v. Posada-Rios*, 158 F.3d 832, 880 (5th Cir. 1998). As with aggravating role adjustments, the fact-specific nature of mitigating role determinations results in a deferential appellate standard of review. "Given the allocation of the burden of proof, a defendant who seeks a downward role-in-the-offense adjustment usually faces an uphill climb in the *nisi prius* court. The deferential standard of review compounds the difficulty, so that a defendant who fails to persuade use at that level faces a much steeper slope on appeal." *United States v. Teeter*, 257 F.3d 14, 31 (1st Cir. 2001).

A. Substantially Less Culpable than the Average Participant

Application Note 3(A) explains that §3B1.2 operates to "provide[] a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." USSG §3B1.2, comment. (n.3(A)). The term "participant" as used in §3B1.2 carries the same meaning as "participant" for purposes of §3B1.1. *See id.* (n.1); *see also* USSG §3B1.1, comment. (n.1) ("A 'participant' is a person who is criminally responsible for the commission of the offense."). Thus, it is clear that the defendant may receive a mitigating role adjustment only if the criminal activity involved at least one other "participant," as the commentary expressly states: "[A]n adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant . . . ." USSG §3B1.2, comment. (n.2). As with aggravating role adjustments, it is not necessary that the other participants actually be convicted for their role in the criminal activity for §3B1.2 to apply.[3]

Courts disagree as to the meaning of "average" participant. Some courts have concluded that the "average" participant means only those persons who actually participated in the criminal activity at issue, so that the defendant's relative culpability is determined only by reference to his or her co-participants. *See United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that "the relevant comparison . . . is to the conduct of co-participants in the case at

[3] The fact that the defendant himself merely aided or abetted the criminal activity does not automatically entitle him to a mitigating role adjustment under §3B1.2. See United States v. Teeter, 257 F.3d 14 (1st Cir. 2001).

hand")[4]; *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993) ("The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy's other participants."). Other courts have concluded that the "average" participant also includes typical offenders who commit similar crimes. Under this latter approach, courts will ordinarily consider the defendant's culpability relative both to his co-participants and to the abstract typical offender. *See United States v. Santos*, 537 F.3d 136, 142 (1st Cir. 2004) ("[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes."); *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999) ("A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime.").

Application Note 3(B) to §3B1.2 provides that a defendant should ordinarily not receive a mitigating role adjustment if he or she benefitted from a reduced offense level by virtue of having been convicted of an offense that was "significantly less serious" than warranted by the actual offense conduct. *See* USSG §3B1.2, comment. (n.3(B)). Courts have applied this note, for example, to deny the adjustments where, by virtue of the offense of conviction, the defendant's base offense level reflected only his own conduct and not the broader conspiracy in which he participated. *See United States v. Lucht*, 18 F.3d 541, 555-56 (8th Cir. 1994). Notably, courts have also interpreted Note 3(B) as applicable to any case in which the defendant's base offense level does not reflect the entire conspiracy, regardless of the offense of conviction. *See United States v. Roberts*, 223 F.3d 377, 381 (6th Cir. 2000) ("Although this note applies by its terms only to a defendant who has been convicted of a lesser offense, it stands for the principle that when a defendant's base offense level does not reflect the conduct of the larger conspiracy, he should not receive a mitigating role adjustment simply because he was a minor participant in that broader criminal scheme.").

B. Minimal and Minor Participants

Upon determining that the defendant was "substantially less culpable than the average participant," Application Notes 4 and 5 explain how to distinguish between "minimal" and "minor" participants. Application Note 4 provides that §3B1.2(a)'s 4-level reduction for minimal participants *"*is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." USSG §3B1.2, comment. (n.4). The note further provides that "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."" *Id.*

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[4] *See also* United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) ("While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the § 3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.") (internal quotations omitted); United States v. Johnson, 297 F.3d 845, 874 (9th Cir. 2002) ("[A] defendant's culpability is to be measured against his co-participants, not a hypothetical 'average participant.'").

Application Note 5 provides that§3B1.2(b)'s 2-level reduction for minor participants applies to defendants who are "less culpable than most other participants, but whose role could not be described as minimal." USSG §3B1.2, comment. (n.5).

C. Interpretive Case Law

Whether the defendant is entitled to a mitigating-role adjustment, was a minimal or minor participant, or occupied a role falling between minimal and minor, is "heavily dependent upon the facts of the particular case." USSG §3B1.2, comment. (n.3(B)). Given the fact-dependent nature of §3B1.2 role adjustments, clear principles are difficult to develop and apply. Courts, however, have interpreted §3B1.2 and its commentary in order to give additional guidance for determining whether to apply a mitigating-role adjustment.

Some courts have offered variations on Application Note 3(A)'s "substantially less culpable" language. In the Third Circuit, the minor role adjustment only applies if the defendant shows that his or her "involvement, knowledge and culpability were materially less than those of other participants" and not merely that "other participants in the scheme . . . may have been more culpable." *United States v. Brown*, 250 F.3d 811, 819 (3d Cir.2001). In the Eighth Circuit, a defendant is not substantially less culpable if he was deeply involved in the offense, even if he was less culpable than the other participants. *See United States v. Cubillos*, 474 F.3d 1114, 1120 (8th Cir. 2007) (citations omitted).

Other courts have concluded that for purposes of applying the 4-level "minimal" participant adjustment, the defendant must have been only a "peripheral figure" in the criminal activity. "To qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity. . . . In short, a defendant must be a plainly peripheral player to justify his classification as a minimal participant." *United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004); *see also United States v. Teeter*, 257 F.3d 14, 30 (1st Cir. 2001) ("To qualify as a minimal participant and obtain the concomitant four-level reduction, the [defendant] would have to prove by a preponderance of the evidence that she was, at most, a peripheral player in the criminal activity."). The Fifth Circuit has gone further, concluding that defendant must demonstrate that he or she played only a peripheral role to receive *any* mitigating role adjustment, even the 2-level minor participant reduction. *See United States v. Miranda*, 248 F.3d 434, 446-47 (5th Cir. 2001) ("A minor participant adjustment is not appropriate simply because a defendant does less than other participants; in order to qualify as a minor participant, a defendant must have been peripheral to the advancement of the illicit activity.").

Finally, at least two courts have developed factors to guide the sentencing court's application of §3B1.2. The Second Circuit has held that in "evaluating a defendant's role," the sentencing court should consider factors such as "the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *United States v. Yu*,

285 F.3d 192, 200 (2d Cir. 2002) (quotation marks omitted). The Third Circuit has concluded that those same factors can be "highly useful in assessing a defendant's relative culpability," at least "where a great deal is known" about the criminal organization. *See United States v. Rodriguez*, 342 F.3d 296, 299 (3d Cir. 2003). However, as the Third Circuit explained, "these factors may be less useful" when there is "little or no information about the other actors or the scope of the criminal enterprise." *Id.*

D. Drug Couriers and Mules

There is a substantial body of case law concerning the application of § 3B1.2 to defendants who were couriers and mules in drug trafficking organizations. Defendants have argued that they are automatically entitled to a mitigating role adjustment based solely on their status as couriers or mules. Courts have uniformly rejected such arguments. However, couriers and mules are not precluded from seeking adjustment under §3B1.2, even if they are held accountable only for the amount of drugs they personally transported. *See* USSG §3B1.2, comment. (n.3(A)). "[A] defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline." *Id.*

Courts have sometimes inconsistently applied §3B1.2 to defendants who were couriers and mules. Some courts have concluded that couriers and mules may perform functions that are critical to the drug trafficking activity and thus may be highly culpable participants. *See, e.g., United States v. Martinez*, 168 F.3d 1043, 1048 (8th Cir. 1999) ("Transportation is a necessary part of illegal drug distribution, and the facts of the case are critical in considering a reduction for minor role."). Other courts have concluded that couriers may have little culpability in drug trafficking organizations. *See United States v. Rodriguez*, 342 F.3d 296, 300 (3d Cir. 2003) ("[D]rug couriers are often small players in the overall drug important scheme."). Ultimately, because the role of a courier or mule may vary from organization to organization, the defendant's culpability and entitlement to a §3B1.2 reduction depends on the facts of the specific case at hand. *See United States v. Saenz*, 623 F.3d 461, 467 (7th Cir. 2010) ("[C]ouriers can play integral roles in drug conspiracies. True, but all drug couriers are not alike. Some are sophisticated professionals who exercise significant discretion, others are paid a small amount of money to do a discrete task."). Courts will deny reductions for couriers and mules upon finding that the defendant was more than a "mere" courier or mule because, for example, the defendant transported a significant quantity of drugs,[5] acted as a courier or mule on multiple occasions,[6] had

[5] *See* United States v. Rodriguez-Castro, 641 F.3d 1189, 1193 (9th Cir. 2011) (affirming denial of reduction where the offense involve 33.46 kilograms of cocaine, which the parties agreed "was a substantial amount"); United States v. Gonzalez, 534 F.3d 613, 617 (7th Cir. 2008) (affirming denial of reduction where, among other facts, the defendant "was trusted to carry a large quantity of cash, pick up a large quantity of drugs from a dealer by himself, transport the drugs in his own car and store them in his own home"); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) (affirming denial of reduction, in part, because the defendant "went on several drug pick-ups, each of which involved a minimum of a pound of methamphetamine"); United States v. Santos, 357 F.3d 136, 143 (1st Cir.

a relationship with the drug trafficking organization's leadership,[7] or was well-compensated for transporting the drugs.[8] *Accord United States v. de Varon*, 175 F.3d 930, 945 (11th Cir. 1999) (en banc) ("In the drug courier context, examples of some relevant factual considerations include: amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.").

2006) (affirming denial of 4-level reduction, despite evidence that the defendant transported drugs on only one occasion, in part because "the quantity of drugs involved in this transaction was very large – and the appellant should have known as much"); United States v. de Varon, 175 F.3d 930, 946 (11th Cir. 1999) (en banc) (affirming denial of reduction where, in addition to other facts, the defendant entered the United States "carrying a substantial amount of heroin of high purity").

[6] *See* Ponce v. United States, 311 F.3d 911, 912-13 (8th Cir. 2002) (affirming denial of reduction where the defendant, in addition to instructing other members of the distribution scheme, transported "4.5 kilograms of methamphetamine, along with various quantities of cocaine and heroin, on at least six separate occasions (supplying a total of 27 kilograms)").

[7] *See* United States v. Garcia, 580 F.3d 528, 529 (7th Cir. 2009) (affirming the district court s denial of a minimal-participant reduction, and observing that the defendant "was fortunate to receive any role reduction at all," where she was close to the drug conspiracy's leadership and transported drugs and money on multiple occasions); United States v. Mendoza, 457 F.3d 726, 730 (7th Cir. 2006) ("One of the factors that sentencing judges should examine while assessing a defendant's role in a criminal enterprise is the defendant's relationship with the enterprises's principal members.").

[8] *See* United States v. Adamson, 608 F.3d 1049, 1054 (8th Cir. 2010) (affirming denial of mitigating role adjustment where the defendant-couriers were "active, necessary, and well-compensated members of this conspiracy"); United States v. Vargas, 560F.3d 45 (1st Cir. 2009) (affirming denial of mitigating role adjustment where the district court considered, among other facts, "the amount of money paid" to the defendant-courier, which was $3,500 for driving a truck with thirty kilograms of cocaine hidden in a secret compartment).